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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MICHAEL MOI, individually,

10 Plaintiff,

11 v.

12 CHIHULY STUDIO, INC., a Washington
corporation, *et al*,

13 Defendant.
14
15
16

NO. 17-CV-00853-RSL

**PLAINTIFF MOI'S RESPONSE TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

NOTED: MARCH 1, 2019

17 **I. INTRODUCTION**

18 Plaintiff Michael Moi submits this memorandum in opposition to the Chihuly
19 defendants' motion for summary judgment. The evidence of record proves that in many
20 instances Michael Moi was the co-author of many of the paintings at issue.¹ Mr. Chihuly did
21 not even create many of the paintings himself.² Under oath, Piper O'Neill confirmed this fact:
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26 ¹ Docket 104: Second Declaration of Moi, Paragraphs 2-6

² *Id.*

4 Do you have an impression as to whether or
5 not Dale often just signed paintings and didn't
6 contribute in any other way?
7 A. Yes.

3

4 Dale Chihuly did not actually sign many of the works — his assistant Billy O'Neill
5 signed for him.⁴ Mr. O'Neill's wife, Piper O'Neill, witnessed Mr. Moi painting the art work at
6 issue — sometimes alongside her husband, Mr. O'Neill.⁵ Mr. Moi did learn some techniques
7 from Mr. Chihuly.⁶ However, for each work, Mr. Moi testifies that he utilized his own
8 judgment and art skills to create the works.⁷ Ms. O'Neill recalls Mr. Moi training her to use
9 the blowtorch involved in making the *Burn Series*.⁸ In that regard, Ms. O'Neill testified as
10 follows:
11

12 8 Q. Well, I'll -- I'll ask it even better. I'm
13 9 more interested to know if -- if you know that if
14 10 Michael worked on paintings, if anybody else worked on
15 11 the same paintings that he did.

16 12 A. If I'm understanding your question, yes.
17 13 That's likely.

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24 ³ Deposition of Piper O'Neill, Page 78 (Second Declaration of Beauregard)

25 ⁴ Docket 104: Second Declaration of Moi, Paragraph 3

26 ⁵ Deposition of Piper O'Neill, Page 10, Lines 7-10 (Exhibit 1 to First Declaration of Beauregard)

⁶ Docket 104: Second Declaration of Moi, Paragraph 5

⁷ *Id.*

⁸ *Id.*, Page 84, Line 4

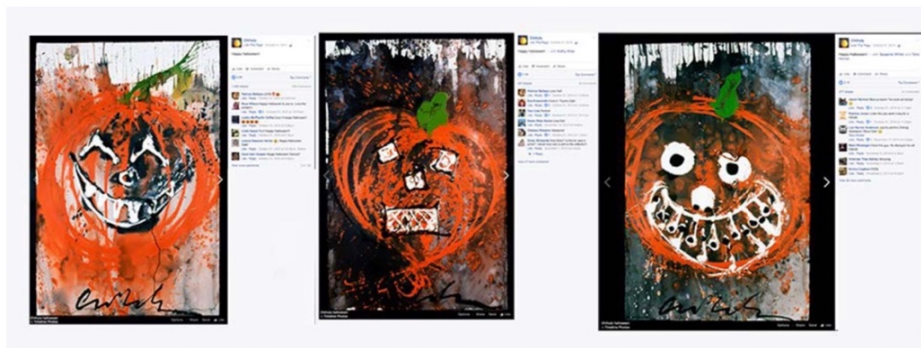
14 Q. Okay.

15 And do you have any way to quantify that or
16 know which ones?

17 A. Well, for the -- the burn series, as I've
18 previously said, he, Michael, burned a lot of those
19 works, but he didn't create the entire composition, so
20 by proxy other people were involved in the creation.

9

Mr. Moi also conceptualized and created the *Pumpkin Series*:



Images of the "Pumpkin" series used on Chihuly's Facebook page for posts in 2013, 2014, and 2015.

10

According to expert testimony, Mr. Moi's contributions are readily considered those of an actual "author" within the art world.¹¹ Mr. Moi participated in the creation of the paintings in reliance upon Mr. Chihuly's repeated expression that they were acting as partners.¹² Prior to filling this lawsuit, Mr. Moi learned from a mutual associate with Dale Chihuly, Victor Humeniuk, that the other assistants had been compensated millions of dollars for their participation — but only under threat of legal action.¹³ Mr. Humeniuk's representations caused Mr. Moi alarm that his ownership interest was in jeopardy.¹⁴ In reaction, Mr. Moi retained

⁹ Deposition of Piper O'Neill, Page 79 Lines 8-20

¹⁰ Docket 104: Second Declaration of Moi, Paragraph 4

¹¹ Docket No. 96, Exhibit 7 (Expert Report of Thompson)

¹² Docket 104: Second Declaration of Moi, Paragraphs 6-8

¹³ *Id.*

¹⁴ *Id.*

1 Anne Bremner, and sent an opening demand of \$21-million for fair compensation.¹⁵ In
2 response, the Chihuly defendants publicly trashed, defamed, and repudiated Mr. Moi's claims
3 of ownership.¹⁶

4 These legal proceedings followed. Discovery has revealed that the Chihuly defendants
5 have disseminated the works at issue to art dealers with representations that Dale Chihuly is the
6 purported sole creator.¹⁷ At the same time, CEO Leslie Chihuly testified that use of assistants
7 is widely understood.¹⁸ Mr. Moi inventoried each piece of art to which he created and/or
8 contributed.¹⁹ Based upon the evidence of record, the Chihuly defendants' motion for summary
9 judgment should be denied.
10

11 II. BACKGROUND

12 On June 2, 2017, Michael Moi filed this lawsuit against the Chihuly defendants.²⁰
13 Specifically, Mr. Moi alleged ownership of assorted paintings and imagery that were created at
14 the Chihuly studios.²¹ The related painting sessions occurred over a period from 1999-2014.²²
15 Mr. Moi's creation of the paintings and imagery at issue renders the art "joint works" under the
16 law. 17 U.S.C. 101 "(A 'joint work' is prepared by two or more authors with the intention that
17 their contributions be merged into any inseparable or interdependent part of a unitary whole").
18 By law, Mr. Moi has an actionable ownership interest in the artwork that he created. 17 U.S.C
19
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21
22 ¹⁵ An art expert inventoried and valued Mr. Moi's work at \$6,864,000-\$9,609,000 – less than 4% of the total portfolio.

23 ¹⁶ Docket 104: Second Declaration of Moi, Paragraph 9

24 ¹⁷ Docket No. 96, Exhibit 7 (Expert Report of Thompson); see also Declaration of Doyle LaCount

25 ¹⁸ Deposition of Leslie Chihuly, Page 19-20 (Docket 95, Exhibit 3)

26 ¹⁹ Docket 104: Second Declaration of Moi; *see also* Deposition of Moi, Pages 198-204 & Exhibit 2 to Declaration of Moi (Second Declaration of Beauregard)

²⁰ Docket No. 1: Complaint for Damages

²¹ *Id.*

²² *Id.*

1 106A (Right of Certain authors to attribution and integrity), 504 (Remedies for infringement:
2 Damages and profits). On this primary factual and legal basis, Mr. Moi pursues damages
3 against Chihuly Studio.²³

4 Dale Chihuly admittedly utilized a number of other assistants in producing the art work
5 at issue: Mike Robinson, Damien Villarreal, Billy O'Neill, and Piper O'Neill.²⁴ The other
6 assistants are believed to have been paid millions in compensation for their work.²⁵ When
7 deposed on January 15, 2019, Ms. O'Neill offered first hand testimony that Mr. Moi
8 participated in creating their art work at issue.²⁶ Ms. O'Neil also testified that Mr. Moi actually
9 provided training on how to create certain portions of the art: "***He taught me how to use a***
10 ***blowtorch.***"²⁷ Ms. O'Neill also testified that she often solely created artwork, which was signed
11 by Dale Chihuly, and then marketed as authentic.²⁸ When deposed on January 22, 2019, Dale
12 Chihuly admitted to the key facts described such as the use of assistants and also marketing
13 artwork as authentic "Chihuly" which he did not actually create, but only signed:
14
15

16 Q. Okay. But, by comparison, does anyone ever — someone else paint a
17 painting, bring it to you, and your only contribution is signing it?

18 A. Yes.²⁹
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23 ²³ *Id.*

24 ²⁴ Deposition of Dale Chihuly, Page 5, Lines 14-15 (Docket 95, Exhibit 2)

25 ²⁵ Docket 104: Second Declaration of Moi

26 ²⁶ Deposition of Piper O'Neill, Page 6-10 (Docket 95, Exhibit 1)

27 ²⁷ *Id.*, Page 84, Line 4

28 ²⁸ *Id.*, Page 78, Lines 3-7

29 ²⁹ Deposition of Dale Chihuly, Page 7, Lines 24-25 to Page 8 Lines 1-2 (Docket 95, Exhibit 2)

1 Ms. O'Neill understood that she was to keep her role a secret.³⁰ Mr. Chihuly would not
2 necessarily know who created which paintings, because he was not even always present when
3 it was created.³¹

4 Ms. O'Neill testified that Mr. Chihuly indicated, early on, that she would be
5 compensated for her contributions.³² Mr. Moi received similar indications of compensation
6 from Dale Chihuly.³³ When it became clear that Mr. Chihuly was not going to follow through
7 with compensation, Ms. O'Neill, and her husband, Billy O'Neill, threatened to sue, as did
8 Damien Villarreal.³⁴ The Chihuly defendants ultimately compensated Ms. O'Neill, and they
9 compensated the other assistants too.³⁵ After Mr. Moi learned that Piper and Billy O'Neill were
10 compensated, on or about February 16, 2017, Mr. Moi also filed a demand.³⁶ The only
11 distinction as between Mr. Moi and the other assistants' claims is that he doubled as a
12 "handyman" — in addition to participating in the painting sessions.³⁷

15 Immediately after this lawsuit was filed, the Chihuly defendants publicly trashed and
16 defamed Mr. Moi issuing widely parroted press releases indicating that Mr. Moi completely
17 fabricated that claims: **"Mr. Moi never worked with Dale as a painting assistant, and he did
18 not participate in the creation of Dale's art. Mr. Moi's claims are not only baseless, they
19 are a complete fabrication,"** Chihuly Inc. said in a news release.³⁸ The Chihuly defendants
20

21 ³⁰ Deposition of Piper O'Neil, Page 81, Lines 2-10 (Docket 95, Exhibit 1)

22 ³¹ Docket 96 (First Declaration of Moi)

23 ³² Deposition of Piper O'Neill, Page 86-89 (Docket 95, Exhibit 1)

24 ³³ Docket 96 (First Declaration of Moi)

25 ³⁴ Deposition of Dale Chihuly, Page 24, Lines 17-18 (Docket 95, Exhibit 2)

26 ³⁵ Docket 83, Exhibit A (Declaration of Schneider)

³⁶ Docket 96 (First Declaration of Moi Exhibit 1 (demand letter))

³⁷ *Id.*

³⁸ <https://www.bizjournals.com/seattle/news/2017/06/02/dale-chihuly-bipolar-struggle-painting-lawsuit-moi.html>
(Docket 95, Exhibit 4)

1 themselves publicized the “\$21-million” demand as utter ridiculousness.³⁹ Television reports
2 were consistent, and humiliating, as published by King 5 News.⁴⁰ Under oath, CEO Leslie
3 Chihuly initially denied responsibility for the press releases: “*It certainly didn’t come from*
4 *us.*”⁴¹ When confronted with the actual television coverage during her deposition, Ms. Chihuly
5 later admitted making the false statements: “*No. I just remember we probably needed to have*
6 *some kind of a response to getting these allegations, and that would have been our response*
7 *that I would still stand by.*”⁴²

9 Via expert witness disclosures dated December 19, 2018, the Chihuly defendants seem
10 to have changed their defense.⁴³ Now, instead of calling Mr. Moi a liar, the Chihuly defendants
11 are using art experts, Jim Schnatz and Kate Elliot, to claim that Mr. Moi *did* contribute to the
12 artwork, but that his contributions were not significant enough to warrant the assignment of
13 value.⁴⁴ For example, Kate Elliot proclaimed: “*Dale’s assistants, who have performed various*
14 *roles in the realization of Dale’s artistic vision for his 2-dimensional drawings and paintings,*
15 *are not properly considered collaborators of Dale.*”⁴⁵ As another example, Jim Schantz
16 proclaimed: “*Collectors and others in the art market who purchase Dale’s drawings (and glass)*
17 *generally understand and appreciate that Dale works with assistants to produce the work.*”⁴⁶

22 ³⁹ *Id.*

23 ⁴⁰ <https://www.king5.com/article/news/local/lawsuit-chihuly-claimed-sole-credit-for-paintings-created-by-others/281-445280567> (Docket 95, Exhibit 5)

24 ⁴¹ Deposition of Leslie Chihuly, Page 1-10 (quote from page 8) (Docket 95, Exhibit 3)

25 ⁴² *Id.*, Pages 59-64 (quote from page 63)

26 ⁴³ Defendant’s Expert Witness Disclosure (Docket 95, Exhibit 6)

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

1 It should be noted that the opinions of Mr. Schnatz and Ms. Elliot are not consistent with the
2 law. *See* 17 U.S.C. 101, 504 (contributions to artwork render participants joint authors).

3 When deposed, CEO Leslie Chihuly now claims that Dale Chihuly's use of assistants
4 to create the artwork at issue was no secret, and widely understood: "***I think it's been well***
5 ***documented that he works as a team, including with the drawings. So there have been lots***
6 ***of photographs, video, everything throughout all of the years I've been associated where he***
7 ***has other team members present when he's painting and helping do things.***"⁴⁷ By contrast,
8 Dale Chihuly testified as follows:
9

10 Q. Do you have an understanding whether or not your paintings are marketed
11 as produced exclusively by you, sir?

12 A. Yes, they are.⁴⁸

13 In the Chihuly defendants' recently filed motion for summary judgment, they admitted
14 the same: "***Between 1999 and 2015, Moi knew that Chihuly signed, marketed, and offered all***
15 ***of the works as the sole author.***"⁴⁹ In this regard, an expert retained by Mr. Moi observed that
16 the general public is unaware that they are purchasing artwork signed, but not always created,
17 by Dale Chihuly: "***MKG has made inquiry's regarding the authenticity of the Art Property.***
18 ***Research collected from galleries or specialist dealers confirm that the referenced Art Property***
19 ***or similar artworks with the same creation dates are sold as being solely by Dale Chihuly.***"⁵⁰
20

21 When asked about this specific topic, potentially deceiving the art purchasers of the world, Mr.
22 Chihuly testified as follows:
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24

25 ⁴⁷ Deposition of Leslie Chihuly, Page 19-20 (Docket 95, Exhibit 3)

26 ⁴⁸ Deposition of Dale Chihuly, Page 16, Lines 21-23 (Docket 95, Exhibit 2)

⁴⁹ Docket No. 90, Page 5 Lines 23-24

⁵⁰ Expert Report of Blades-Lines, Page 1 (Docket 95, Exhibit 7)

1 Q. Do you have any concerns that somebody who has a painting signed by you
2 on their wall were to find out that you didn't contribute to it other than your
signature, is that something you consider to be a concern or a problem?

3 A. I don't know how they would feel.

4 Q. Does it matter to you?

5 A. Well, let's just say I don't think about it.⁵¹

6 According to Mr. Chihuly, "***I think the ownership of a piece of art is owned by the***
7 ***person that signs it.***"⁵² Of the paintings at issue, Mr. Chihuly has a large volume at his
8 warehouse in Tacoma: "***Well, it's more than 1,000.***"⁵³ The value of each piece can fluctuate.
9 Mr. Moi's expert noted exemplar ranges between \$24,000-\$44,000 each piece.⁵⁴ Chihuly's
10 warehouse full of property, and the other art work that was already sold for a large profit, and
11 created in part by Mr. Moi, is the subject of this dispute.
12

13 III. EVIDENCE RELIED UPON

14 Mr. Moi relies upon the existing pleadings and filings of records in accord with Fed. R.
15 Civ. Pro. 10(c) and also the newly filed Second Declaration of Michael Moi and the Second
16 Declaration of Lincoln C. Beauregard with exhibits.
17

18 IV. ARGUMENT: MR. MOI'S JOINT AUTHORSHIP RIGHTS

19 By law, copyright law recognizes Mr. Moi as a joint author and co-owner of the art work
20 at issue. See 17 U.S.C. 101; *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990);
21 *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000); *Gaiman v. McFarlane*, 360 F.3d 644 (7th
22 Cir. 2004) (recognizing copyright interest by script writer in comic-book characters). Copyright
23

24
25 ⁵¹ Deposition of Dale Chihuly, Page 18, Lines 13-23 (Docket 95, Exhibit 2)

26 ⁵² *Id.*, Page 13, Lines 15-16

⁵³ *Id.*, Page 20 Line 15

⁵⁴ Expert Report of Blades-Lines, Page 6-7 (Docket 95, Exhibit 7)

1 law does not protect creative ideas; rather it protects the tangible expression of those ideas. *Id.*
2 at 658-60. Authorship is generally a question of fact. *Del Madera Properties v. Rhodes &*
3 *Gardner, Inc.*, 820 F.2d 973, 980 (9th Cir. 1987). Authors of joint works are co-owners of the
4 copyrights in the work. 17 U.S.C. 201(a). Because Mr. Moi was the co-author of many of the
5 pieces, with nominal participation by Mr. Chihuly, he can (and does) claim full ownership as
6 to those specific pieces. *Ashton v. Tate Corp. v. Ross*, 728 F. Supp. 2d 597, 601 (N.D. Cal.
7 1989), *aff'd* 916 F.2d 516 (1990). Based upon the law, Mr. Moi is entitled to fair compensation
8 for his contributions. *Id.*
9

10 During the discovery period, the Chihuly defendants disclosed copies of the 6,159
11 paintings created in the Chihuly portfolio.⁵⁵ In order to determine which works Mr. Moi
12 created, he reviewed each image.⁵⁶ As a result of Mr. Moi's review, he was able to identify
13 285⁵⁷ paintings/drawings that he created, or helped create, in the manner described under oath.⁵⁸
14 Those paintings and drawings are also inventoried in the expert report of Barbara Blades-Lines,
15 ISA-Am dated December 14, 2018.⁵⁹ Based upon Mr. Moi's participation in the creation of the
16 art work, he can say with a reasonable degree of certainty that he, more likely than not,
17 participated individually and/or as a team in the creation of each piece identified.⁶⁰ Mr. Moi
18 could be even *more* certain if Mr. Chihuly and Mr. O'Neill produced their calendars to further
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23 ⁵⁵ See e.g. Docket 92.1, Pages 183-301 (Exhibits to Rava Declaration); see also Exhibit 2 to Deposition of Moi;
24 Deposition of Moi, Pages 198-204 & Exhibit 2 to Declaration of Moi (Second Declaration of Beauregard)

25 ⁵⁶ Docket 92.1, Pages 23-32 (Exhibits to Rava Declaration)

26 ⁵⁷ Originally Moi identified "286" pieces of art but recognized that he was in error as to one (1) piece when
deposed.

⁵⁸ *Id.*

⁵⁹ Docket No. 96, Exhibit 7 (First Declaration of Moi)

⁶⁰ Deposition of Moi, Pages 198-204 & Exhibit 2 to Declaration of Moi (Second Declaration of Beauregard)

1 cross-reference, which they have not done.⁶¹ Beyond that, Mr. Moi *never* indicated that he
2 could not identify the work or his contributions, as claimed in the moving brief by the Chihuly
3 defendants.⁶² Ms. Blades inventoried the value of Mr. Moi's work at \$6,864,000-\$9,609,000 –
4 less than 4% of the total portfolio.⁶³

5 A "joint work" requires each author to make "an independently copyrightable
6 contribution." *Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 968 (9th Cir.
7 2008). The art work at issue are not just copies of other Chihuly paintings, *i.e.* derivative
8 works.⁶⁴ For every piece of art that Mr. Moi assisted and/or created, he was engaged in artistic
9 expression using his own artistic judgment.⁶⁵ Ms. O'Neill, a trained artist, felt the same way
10 as Mr. Moi about her contributions to the other "indistinguishable" works of art:
11

12 1 Q. Got it.

13 2 And I -- while I have my client, I can ask
14 3 him. I'm still learning some of the background
15 4 information.

16 5 Your artistic background, can you tell me
17 6 about that, please?

18 7 A. I've studied art since I was a child. I
19 8 studied privately with my mentor, who was a tenured
20 9 college professor at Brooklyn College, from the time I
21 10 was 13 until I was 18. Got my BFA from Parsons School
22 11 of Design in New York City. Got my master's of
23 12 communication in digital media from U-Dub. And been
24 13 working professionally as an artist ever since.

24 ⁶¹ Any equivocation as to my testimony was in the form of assertions me indicating that with more assistance from
25 Mr. Chihuly and Mr. O'Neill any and all doubt about the art that I assisted in creating could be eliminated.

26 ⁶² Docket 90, Pages 9-12 (Defendants' MSJ)

⁶³ Docket No. 96, Exhibit 7 (First Declaration of Moi)

⁶⁴ Docket 104: Second Declaration of Moi, Paragraph 4

⁶⁵ *Id.*

1 14 Q. And in the work that you did with the
2 15 paintings, for example, at Dale Chihuly Studio, did
3 16 you consider yourself -- yourself engaged in an
4 17 artistic practice?

5 18 A. Yes.

6 19 Q. And you were contributing to the actual work
7 20 itself.

8 21 A. Yes.

66

9 Mr. Moi described the process used by the group of assistants to create the “*indistinguishable*”
10 pieces of art:

11 *The methods that we utilized were varied, but generally took a similar pattern –*
12 *at least when Mr. Chihuly participated. Working just a few steps ahead of Mr.*
13 *Chihuly, Mr. O’Neill and myself would begin to “mop out” the background*
14 *colors. Mr. Chihuly would follow on our heels with dots, drips, and lines of his*
15 *own. Once completed, Mr. Chihuly and Mr. O’Neill would add additional fine*
16 *touches: lip wraps, body wraps, reeds, or other abstract forms. The final step*
17 *was the placement of Mr. Chihuly’s signature on the art work. Sometimes Mr.*
18 *Chihuly signed himself. On other occasions, Mr. O’Neill signed for Mr. Chihuly*
19 *– because Mr. Chihuly was not always present during the creation.*⁶⁷

20 In the moving brief, the Chihuly defendants are asking the Court to disregard the
21 testimony of Mr. Moi and Ms. O’Neill and declare, as a matter of law, that the creation of “*the*
22 *backgrounds*” and other fine touches of the following paintings *is not* a form of artistic
23 expression:
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⁶⁶ Deposition of Piper O’Neill, Page 49 Lines 1-18

⁶⁷ Docket 104: Second Declaration of Moi, Paragraph 3



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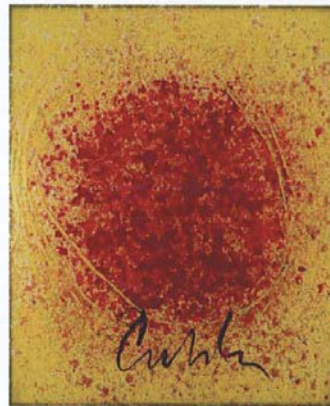


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ID: 6565

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At times, Mr. Moi did channel some of what he learned from Mr. Chihuly.⁷⁰ But at no time was Mr. Moi simply copying other art work that had already been created.⁷¹ Mr. Moi actually taught Piper O'Neill how to use the blow torch for the Burn Series: “*He taught me how to use a blowtorch.*”⁷² Mr. Moi’s art expert witness, Erin J. Thompson, PhD, agrees that his work is properly considered artistic expression: “*Moi’s contributions were of the nature in*

⁶⁸ Docket 92-1, Page 185 (Exhibit 2 to Declaration of Rava)

⁶⁹ Docket 92-1, Page 187 (Exhibit 2 to Declaration of Rava)

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*, Page 84, Line 4

1 *the artistic community are considered inseparable, symbiotic, and codependent parts of the*
2 *artwork's creation that were combined into a single final product.”*⁷³ Dr. Thompson rendered
3 this opinion premised upon the evidentiary record primarily in the form of Mr. Moi testimony
4 about having been a co-author of each piece of art.⁷⁴ Mr. Moi was of the understanding that
5 along with Mr. Chihuly, they had been working as a team.⁷⁵
6

7 On the topic of superintendent control, this case is unlike case law relied upon the
8 Chihuly defendants such as *Thomson v. Larson*, 147 F.3d 195 (2nd Cir. 1998). In *Thomson* the
9 plaintiff offered nominal contributions in relation to the alleged joint work. *Id.* CEO Leslie
10 Chihuly testified that it is widely understood that the paintings are held out as joint creations
11 by Dale Chihuly along with assistants.⁷⁶ In this case, Mr. Moi created entire lines of art work
12 which often were signed by Billy O'Neill emulating Dale Chihuly's signature.⁷⁷ Mr. Chihuly
13 allegedly has “*no recollection*” of the events, and therefore cannot dispute them.⁷⁸ In the
14 moving brief, the Chihuly defendants admit that “*Chihuly's contemporaneous engagement*
15 *can, at time, vary, — depending largely upon his help...*”⁷⁹ Ms. O'Neill observed her
16 husband, Billy, and Mr. Moi creating the artwork together: “*I believe it was sometime in 2014,*
17 *and it was evening. And I wasn't painting. I just remember I went to the studio to drop food*
18 *off for Billy, and they were painting. He and Micheal were painting.*”⁸⁰ Mr. Moi describes
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22 ⁷³ Docket No. 96, Exhibit 7 (Expert Report of Thompson)

23 ⁷⁴ *Id.*

24 ⁷⁵ Docket 104: Second Declaration of Moi, Paragraph 6

25 ⁷⁶ Deposition of Leslie Chihuly, Page 19-20 (Docket 95, Exhibit 3)

26 ⁷⁷ Docket 104: Second Declaration of Moi, Paragraph 5

⁷⁸ Docket 90, Page 5 Line 7 (Defendants' MSJ)

⁷⁹ Docket 90, Page 3 Lines 22-4 (Defendants' MSJ)

⁸⁰ Deposition of Piper O'Neill, Page 10, Lines 7-10 (Exhibit 1 to First Declaration of Beauregard)

1 having co-created many/most of the paintings when Mr. Chihuly was not even present.⁸¹
2 Moreover, Mr. Moi reserves the right to seek a “copyright” interest in the art work if he is not
3 deemed a “joint author” at trial. *See e.g. Aalmuhammed*, 202 F.3d 1227.

4 Mr. Moi’s evidence proves all of the elements of a joint authorship claim. *Compare*
5 *Ford v. Ray*, 130 F. Supp. 3d 1358, 1362 (W.D. Wash. 2015)(J. Lasnik). This case is *not*
6 analogous to David Ford coming up with a few beats which Sir-Mix-A-Lot then used to create
7 the *fantastic* hit songs.⁸² If Mr. Ford was revealed as the *sole* author of Baby-Got-Back, this
8 Court undoubtedly would have ruled differently. *Id.* By contrast, Mr. Moi exercised artistic
9 control over each piece of artwork.⁸³ Furthermore, according to CEO Leslie Chihuly it is
10 widely understood that the paintings are created in collaboration with the assistants.⁸⁴ Second,
11 Mr. Moi testifies that Mr. Chihuly extended express assurances that they were working as team
12 in order to share the profits.⁸⁵ Third, the evidence of record, including the expert testimony of
13 Dr. Thompson, established a broad audience appeal as an extension of both men’s contribution.
14 Specifically, Dr. Thompson’s investigation identified that multiple dealers have pieces of art
15 which were created by Moi and are being marketed for tens of thousands of dollars:
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Potential client: <i>Did the artist frame the drawings? Are these drawings by Dale Chihuly or Dale Chihuly and his studio?</i> Art dealer: <i>Yes, these works were painted by Dale himself and were framed in Seattle prior to being sent to our gallery.</i>

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⁸¹ Docket 104: Second Declaration of Moi, Paragraph 3

25 ⁸² Admittedly, *Baby-Got-Back* is a rump shaking masterpiece by one of Seattle’s finest rappers.

26 ⁸³ Docket 104: Second Declaration of Moi, Paragraph 6

⁸⁴ Deposition of Leslie Chihuly, Page 19-20 (Docket 95, Exhibit 3)

⁸⁵ Docket 104: Second Declaration of Moi, *Generally*



Dale Chihuly, *Ruby Sunset Ikebana Drawing*
2007, acrylic on paper
42 x 30 inches
\$24,000



Dale Chihuly, *Float Drawing*
2008, acrylic on paper
42 x 30 inches
\$24,000

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Based upon this evidence, the extent to which Mr. Moi acquired an ownership interest in the 286 pieces of art at issue is a question of fact. *See* Fed. R. Civ. Pro. 56.

V. ARGUMENT: JOINT AUTHORSHIP RIGHTS – STATUTE OF LIMITATIONS

According to 17 U.S.C. 106A(d)(1), Mr. Moi's rights to the ownership interest in the paintings is his entire lifetime.⁸⁷ Moreover, for years, Mr. Chihuly assured Mr. Moi that they were co-owners of the paintings.⁸⁸ Mr. Chihuly did not actually sign all of the paintings.⁸⁹ And when Mr. Chihuly did sign, it was with the understanding that Mr. Moi was a co-author, and not any form of contemporaneous repudiation as alleged by the Chihuly defendants.⁹⁰ CEO Leslie Chihuly testified that the co-authorship with assistants is publicly acknowledged.⁹¹ Not

⁸⁶ Docket No. 96, Exhibit 7 (Expert Report of Thompson, Pages 25-31)

⁸⁷ 17 U.S.C. 106A (d) Duration of rights.--(1) With respect to works of visual art created on or after the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author.

⁸⁸ Docket 104: Second Declaration of Moi, Paragraph 6

⁸⁹ *Id.*, Paragraph 3

⁹⁰ *Id.*, Paragraph 6

⁹¹ Deposition of Leslie Chihuly, Page 19-20 (Docket 95, Exhibit 3)

1 until a conversation that occurred on December 26, 2016 with a mutual Dale Chihuly
2 acquaintance, Victor Humeniuk, Mr. Moi believed his ownership interest in the warehouse full
3 of paintings was safe and not in dispute.⁹² Mr. Moi was of the understanding that the Chihuly
4 defendants had compensated Mr. O'Neill, Ms. O'Neill, and Mr. Villarreal millions of dollars.⁹³
5 It would be fundamentally unfair for the other assistants to receive millions in payouts for the
6 indistinguishably different painting, and for Mr. Moi to receive nothing — except public
7 ridicule and slander.⁹⁴
8

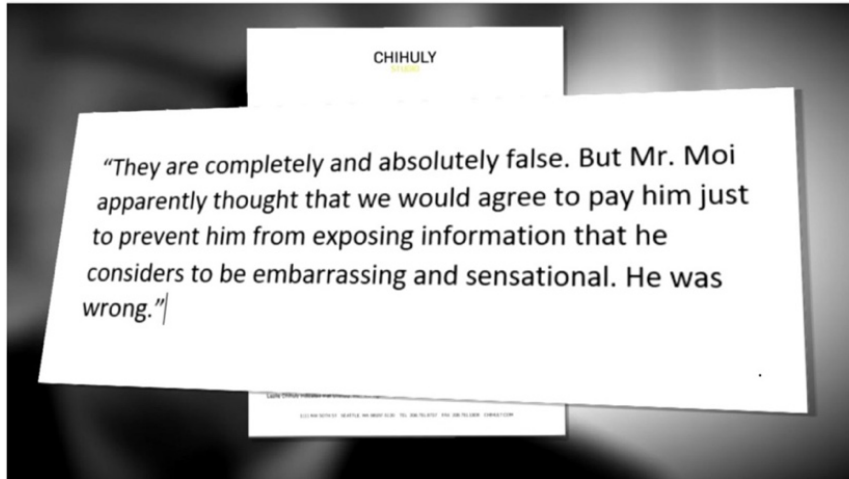
9 The statute of limitations for copyright infringement is three (3) years from the date the
10 claim accrued. *See* 17 U.S.C. 507(b). “A cause of action for infringement accrues when one
11 has knowledge of a violation or is chargeable with such knowledge.” *Roley v. New York World*
12 *Pictures, Ltd.* 19 F.3d 479 (9th Cir. 1994). After the conversation with Mr. Humeniuk on
13 December 26, 2016, Mr. Moi retained legal counsel and demanded compensation.⁹⁵ Thereafter,
14 the Chihuly defendants repudiated Mr. Moi’s ownership, including publicly trashing and
15 defaming him:
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25 ⁹² Docket 104: Second Declaration of Moi, Paragraphs 6-9

26 ⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Docket 96 (First Declaration of Michael Moi)



96

Mr. Moi timely filed this lawsuit, well within three (3) years of repudiation, against the Chihuly defendants.⁹⁷ For these reasons, the Chihuly defendants' statute of limitations argument fails.

VI. ARGUMENT: MR. MOI'S VARA CLAIMS

For the reasons articulated in relation to Mr. Moi's joint-works claims, the Chihuly defendants' arguments related to the VARA claims also fail.

VII. ARGUMENT: MR. MOI'S PROMISORY ESTOPPEL CLAIM

Mr. Moi relied upon Mr. Chihuly's promises of compensation and promises that Chihuly Studio had kept a record of all the joint works in exchange for years of participation painting sessions.⁹⁸ Ms. O'Neill confirmed receiving similar overtures and promises of compensation for her work.

⁹⁶ *Id.*

⁹⁷ Docket No. 1: Complaint for Damages

⁹⁸ Docket 90, Page 7 Line 9-10 (Defendants' MSJ citing Moi Deposition, Page 17-19)

1 Q. (By Mr. Beauregard) Sure.
2 I mean, like over all this course of, you
3 know, give -- giving up your weekend after weekend, it
4 must have crossed your mind that, "Hey, I -- maybe I
5 should get paid for this," at some point.
6 A. I had an understanding of why I was there.
7 Q. Okay.
8 And what was that?
9 A. I had an understanding with Dale.
10 Q. And what -- and what was that, please?
11 A. In simplest form, that I'd be taken care of.
12 Q. And what led you to believe that?
13 A. He and I talking about it.
14 Q. Okay.
15 Can you tell me when you might have talked
16 about it and what was said?
17 A. That would have been early on after the
18 first few sessions I attended.
19

99

14 Based upon Mr. Chihuly's promises, Mr. Moi did not deem it necessary to reduce their
15 agreement to writing or to keep an independent log of the paintings that he created.¹⁰⁰ To obtain
16 recovery in promissory estoppel, plaintiff must establish

17 "(1) [a] promise which (2) the promisor should reasonably expect to cause the
18 promisee to change his position and (3) which does cause the promisee to change
19 his position (4) justifiably relying upon the promise, in such a manner that (5)
20 injustice can be avoided only by enforcement of the promise."

21 *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash.2d 255, 259 n. 2, 616 P.2d 644
22 (1980) (quoting *Corbit v. J.I. Case Co.*, 70 Wash.2d 522, 539, 424 P.2d 290
23 (1967)); see Restatement (Second) of Contracts § 90 (1981). Promissory estoppel requires the
24 existence of a promise. *Klinke*, 94 Wash.2d at 259, 616 P.2d 644; Restatement (Second) of

25
26 ⁹⁹ Deposition of Piper O'Neill, Page 86-89 (Docket 95, Exhibit 1)

¹⁰⁰ *Id.*

1 Contracts § 90. A promise is “a manifestation of intention to act or refrain from acting in a
2 specified way, so made as to justify a promisee in understanding that a commitment has been
3 made.” Restatement (Second) of Contracts § 2(1); *see* § 90 cmt. a (referring to promise
4 definition in § 2). Each element of the claim is soundly satisfied.

5 None of the Chihuly defendants’ arguments are dispositive. Mr. Chihuly promise to
6 Mr. Moi is not “*impermissibly vague*”¹⁰¹ as a matter of law. None of the unpublished case law
7 cited by the Chihuly defendants is analogous. Mr. Chihuly’s promises were repeated over a
8 period of years.¹⁰² Mr. Moi reasonably interpreted Mr. Chihuly’s related assertions as promises
9 of compensation.¹⁰³ There is nothing “*impressively vague*” about promising to pay someone
10 for their work, and then not doing so.¹⁰⁴

11
12 The fact that Mr. Chihuly’s promise was a “*statement of future intent*”¹⁰⁵ is not a viable
13 defense. In the case law relied upon by the Chihuly defendants, *Meissner v. Simpson Timber*
14 *Co.*, 69 Wn.2d 949, 421 p.2d 674 (1966), the Court noted that the defending party had only
15 stated an “intent” to make compensation, but not a promise. *Id.* Here, on this factual record, a
16 jury is likely to find that, as with Piper O’Neill, Mr. Chihuly’s assertions were properly
17 understood as promises of compensation to Mr. Moi.¹⁰⁶ Mr. Chihuly made Ms. O’Neill the
18 same promises.¹⁰⁷ Ms. O’Neill was eventually compensated for her work.¹⁰⁸ This common
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21

22 ¹⁰¹ Docket 90, Page 21 Line 14 (Defendants’ MSJ)

23 ¹⁰² Docket 104: Second Declaration of Moi, Paragraphs 6-9

24 ¹⁰³ *Id.*

25 ¹⁰⁴ *Id.*

26 ¹⁰⁵ Docket 90, Page 22 Line 7 (Defendants’ MSJ)

¹⁰⁶ Docket 104: Second Declaration of Moi

¹⁰⁷ Deposition of Piper O’Neill, Page 86-89 (Docket 95, Exhibit 1)

¹⁰⁸ Docket 104: Second Declaration of Moi

1 law truth is further fortified by the fact that the federal law bestows an ownership interest upon
2 Mr. Moi. *See* 17 U.S.C 101.

3 The “*statute of frauds*”¹⁰⁹ is not a viable defense. The statute of Frauds provision,
4 requiring performance of the alleged oral agreement within one year of the making of the
5 agreement, does not apply to an oral partnership which is for an indefinite length of time and
6 terminable at will. *Duckworth v. Langland*, 95 Wash.App. 1, 988 P.2d 967, review denied 138
7 Wash.2d 1002, 984 P.2d 1033. The statute of frauds does not apply to void an oral contract
8 which has been fully performed by one of the parties. *Rutcosky v. Tracy*, 89 Wash.2d 606, 574
9 P.2d 382 (1978), certiorari denied 99 S.Ct. 317, 439 U.S. 930, 58 L.Ed.2d 323. Recovery in
10 quantum meruit, valued under terms of agreement, will be allowed for work already performed
11 under oral services agreement which is void under statute of frauds. *French v. Sabey Corp.*
12 (1997) 85 Wash.App. 164, 931 P.2d 204, review granted 132 Wash.2d 1006, 940 P.2d 654,
13 affirmed 134 Wash.2d 547, 951 P.2d 260.
14
15

16 Additionally, the express terms of the statute of frauds do not require a written
17 agreement to memorialize Mr. Moi and Mr. Chihuly’s understanding. *See* RCW 19.36.010.
18 Mr. Moi *could* have been paid within one (1) year. *Id.* Mr. Moi’s claim had nothing to do with
19 answering for Mr. Chihuly’s debts. *Id.* This case has nothing to do with documenting a
20 marriage. *Id.* There are no issues relation to probate matters. Real estate is not at issue. *Id.* It
21 should be noted that under the federal law, Mr. Moi has an ownership interest in the paintings
22 irrespective of any contract. 17 U.S.C. 101. In this way, Mr. Moi’s common law claims, when
23 brought in conjunction with the federal claims, are not subject to the statute of frauds. *Id.*
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¹⁰⁹ Docket 90, Page 20 Line 4 (Defendants’ MSJ)

1 Overall, this is a classic case of promissory estoppel because Mr. Moi did make a
2 “*detrimental change his position*”¹¹⁰ in the form of relying upon Mr. Chihuly promises in
3 exchange for his time and effort and also in dependence upon Chihuly Studio’s purportedly
4 keeping an inventory of his work.¹¹¹ Mr. Chihuly made Mr. Moi a promise and then reneged
5 on it.¹¹² What’s worse is that the Chihuly defendants added insult to injury by publicly trashing
6 and defaming Mr. Moi in order to conceal what Dr. Thompson describes as potentially civil
7 and criminal RICO violations just to turn a huge profit.¹¹³ At trial, the evidence will prove that
8 the Chihuly defendants acted without honor and in order to fuel their greed.¹¹⁴

10 **VIII. MR. MOI IS ENTITLED TO SOME FORM OF COMPENSATION**

11 On Page 23 of the moving brief, the Chihuly defendants argue that Mr. Moi is entitled
12 to some form of compensation. Mr. Moi agrees. Even if every other argument fails, Mr. Moi
13 is entitled to compensation premised upon (1) the principles annunciated in the Chihuly
14 defendants’ moving brief, (2) for the copyrightable portions of the paintings, or (3) under
15 principles of equity under the common law.
16

17 **IX. CONCLUSION**

18 The only other assistant deposed thus far, Piper O’Neill, witnessed Mr. Moi in the act
19 of creating some of the paintings at issue. Mr. Moi inventoried the 285 paintings that he created
20 by a careful review of each piece. In an effort to be honest and precise, Mr. Moi asserted that
21 with the benefit of Mr. Chihuly and Mr. O’Neill’s calendars, if they exist, it might be possible
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24 ¹¹⁰ Docket 90, Page 23 Line 4 (Defendants’ MSJ)

25 ¹¹¹ Docket 104: Second Declaration of Moi

26 ¹¹² *Id.*

¹¹³ Docket No. 96, Exhibit 7 (Expert Report of Thompson, Page 2)

¹¹⁴ *Id.*

1 to be certain, with no doubts. However, on this evidentiary record, Mr. Moi is certain that,
2 more likely than not, he created the 285 pieces that he identified. When deposed, Mr. Moi
3 admitted that he had mixed up one (1) piece of art, thereby reducing the total from 286-285.
4 For each work, Mr. Moi did use the skills that he learned, in part, from Mr. Chihuly. However,
5 each piece of art work is a stand-alone piece of are and not just a replication of that which
6 already exists. Some of the art lines were the *primary* creations of Mr. Moi. The Chihuly
7 defendants compensated the other assistants millions of dollars for their contributions to the
8 paintings. Mr. Moi is similarly situated, and also deserves millions of dollars in compensation
9 too. The Chihuly defendants' defense of this lawsuit has been vicious, and inconsistent. It
10 should not have been necessary to publicly trash and defame Mr. Moi absent a motivation to
11 cover up wrongdoing. Mr. Moi is an honest man who is seeking nothing more than his fair
12 compensation under the law. Based upon the evidence of record, the Chihuly defendants'
13 motion for summary judgment should be denied in entirety.
14
15

16
17 DATED this 12th day of February, 2019.

18 CONNELLY LAW OFFICES, PLLC

19 *Lincoln Beauregard*

20 By _____
21 Lincoln C. Beauregard, WSBA No. 32878
22 Evan T. Fuller, WSBA No. 48024
23 Attorneys for Plaintiff
24
25
26

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies under penalty of perjury under the laws of the State of
3 Washington, that on the date noted below, a true and correct copy of the foregoing was delivered
4 and/or transmitted in the manner(s) noted below:

5 Harry H. Schneider, Jr., WSBA No. 9404 6 Susan E. Foster, WSBA No. 18030 7 Williams C. Rava, WSBA No. 29948 8 1201 Third Avenue, Suite 4900 9 Seattle, Washington 98101-3099 10 hschneider@perkinscoie.com sfoster@perkinscoie.com wrava@perkinscoie.com	<input type="checkbox"/> Via Legal Messenger <input checked="" type="checkbox"/> Via Email <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via U.S. Mail
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11 DATED this 12th day of February, 2018.

12
13
14 CONNELLY LAW OFFICES, PLLC

15 *Marla H. Folsom*

16 By _____
17 Marla H. Folsom, Paralegal